Supreme Court, U.S.
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NO. 01-1001

In The
Supreme Court of the United States
October Term, 2001

TROY R. STUART,
Petitioner,

v.

STATE OF OHIO,
Respondent.

Petition For A Writ Of Certiorari
To The Supreme Court Of Ohio

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

SHOULD A WRIT OF CERTIORARI BE GRANTED WHERE THE PETITIONER DID NOT RAISE A FEDERAL ISSUE REGARDING THE CONSTITUTIONALITY OF OHIO EVID.R. 807 IN THE STATE COURTS?

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Respondent State Of Ohio Respectfully Prays That This Court Deny A Writ Of Certiorari And Dismiss The Petition.

STATEMENT OF THE CASE AND FACTS

The Respondent herein incorporates the Statement of the Case and Statement of Facts as presented in Petitioner's Petition for a Writ of Certiorari.

REASONS FOR DENYING THE WRIT

OHIO EVID.R. 807 DOES NOT DENY THE PETITIONER HIS SIXTH AMENDMENT RIGHT TO CONFRONT HIS ACCUSER BECAUSE THIS RULE INDICATES HEARSAY STATEMENTS CAN ONLY BE ADMITTED WHERE THEY ARE SUPPORTED BY PARTICULARIZED GUARANTEES OF TRUSTWORTHINESS.

The Petitioner contends that the trial court improperly admitted hearsay testimony of a child declarant in violation of his sixth amendment right to counsel. Here, the trial court followed Ohio Evid.R. 807 when allowing the victim's out-of-court statements to be admitted at trial. This rule states that a child declarant's statements are admissible if these statements are reliable based upon the totality of the circumstances of the statement, the child's testimony is not reasonably obtainable, there is independent proof of the sexual act and the defendant is given notice of the statement. Ohio Evid.R. 807(A)(1-4). The rule also states that a child's

statement is not reasonably obtainable if "the child refuses to testify concerning the subject matter of the statement or claims a lack of memory of the subject matter of the statement after a person trusted by the child, in the presence of the court, urges the child to both describe the acts described by the statement and to testify." Ohio Evid.R. 807(B)(1).

Here, the Petitioner admits that the procedural aspects of this rule were followed in this case when admitting the hearsay testimony. In essence, Petitioner argues that Ohio Evid.R. 807 violates his sixth amendment right to confrontation by allowing into evidence the victim's hearsay statements without a determination that he is unavailable to testify or an appropriate guarantee that his statements were trustworthy.

Respondent contends that Petitioner has not properly preserved this federal issue in state courts. The

Ohio Ninth District Court of Appeals and the trial court never addressed whether Ohio Evid.R. 807 denied the Petitioner his constitutional right to confront his accuser. This Court has indicated that where the state court has failed to review the federal matter, it is assumed that the petitioner failed to properly present the issue:

> Hence, in order to vindicate our jurisdiction to deal with this particular issue, we must inquire whether that question was presented to the New York courts in such manner that it was necessarily decided by the New York Court of Appeals when it affirmed appellant's conviction. If the question was not so presented, then we have no power to consider it. *See* 28 U.S.C. §§1257(2), 1257(3); *Bailey v. Anderson*, 326 U.S. 203, 206-207 (1945). Moreover, this Court has stated that when, as here, the highest court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary. *See, e.g., Bailey v. Anderson, supra*; *Chicago, I. & L. R.*

> *Co. v. McGuire*, 196 U.S. 128, 131-133 (1905).

Street v. New York, 394 U.S. 576, 581-582 (1969).

Respondent contends the Petitioner failed to challenge the constitutionality of Ohio Evid.R. 807 in state courts and has failed to preserve this federal issue on appeal.

Assuming this Court finds that Petitioner preserved this issue, the Petitioner's argument must still be rejected. Ohio Evid.R. 807 does not violate Petitioner's sixth amendment right to confront his accusers. This Court has indicated that the sixth amendment does not guarantee the defendant an absolute right to a face-to-face meeting with a witness who testifies against him at trial. *Maryland v. Craig*, 497 U.S. 836, 849 (1990).

> As we suggested in *Coy*, our precedents confirm that a defendant's right to confront accusatory witnesses may be satisfied absent a physical,

> face-to-face confrontation at trial only where denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured. *See* 487 U.S. at 1021 (citing *Roberts, supra*, 448 U.S. at 64; *Chambers, supra*, at 295); *Coy, supra*, 487 U.S. at 1025 (O'CONNOR, J., concurring).

Id. at 850.

This court has recognized that protecting child victims of sex crimes from trauma and embarrassment is a compelling state reason that outweighs a defendant's right to confront his accuser. *Id.* at 852. Here, Ohio Evid.R. 807 was specifically enacted to protect the welfare of a child rape victim. *See State v. Boston*, 46 Ohio St.3d 108, 545 N.E.2d 1220 (1989).

Further, this rule requires that the trial court make a case specific finding that the declarant's statements are reliable. *See Idaho v. Wright*, 497 U.S. 805 (1990). This rule indicates the trial court is to find that the declarant's "statement provides particularized guarantees of

trustworthiness that make the statement at least as reliable as statements admitted pursuant to Evid.R. 803 and 804 based upon the totality of the circumstances." This provision codifies the sixth amendment confrontation requirements required by this Court. *State v. Cardosi*, 122 Ohio App.3d 70, 75, 701 N.E.2d 44 (1997). Here, both the trial court and the Ohio Ninth District Court of Appeals indicated that the surrounding circumstances of the victim's statement indicate that these statements were reliable and trustworthy.

Finally, the Ohio rule requires that a child's hearsay statements are only admissible if the child is unable to testify about the sexual acts. Ohio Evid.R. 807(B)(1). Here, the trial court found that the victim became upset when asked about the sexual abuse in front of the defendant:

> At the 807 hearing, Dylan initially responded well to neutral, non-emotional questions unrelated to sexual activity. When asked about

> any matters or details of a sexual nature, he became sullen, fidgety, unresponsive, hanging and shaking his head in a negative way and hiding his face. Any response was negativistic, and he always responded "no" if pressed, encouraged or cajoled to respond. It ultimately became clear that Dylan was not, would not, and could not be coaxed, pressured, or cajoled into answering questions in the sexual area and relative to Uncle Troy. It was clear that Dylan, although physically present and competent, was in fact unavailable to testify relative to any substantive matters and issues before the Court in this case. There is no reasonable basis for this Court to believe or assume that availability in this area will improve or change. Thus, Dylan is found to be not reasonably available to testify in this case. Having found Dylan unavailable, we must consider the admissibility of Dylan's out-of-court statements to others proposed to be used by the State at trial.

Implicit in the court's findings in that Dylan was unable to testify based upon the emotional distress of testifying in front of the defendant. Here, there was a

case specific finding of necessity why Dylan could not testify in this case. *Compare, Maryland v. Craig*. Therefore, the trial court did not violate Petitioner's sixth amendment right to confrontation by admitting the child's hearsay statements to be admitted at trial.

Based on the foregoing arguments, this Court must deny this writ.

CONCLUSION

The Petitioner failed to assert that Ohio Evid.R. 807 denied the Petitioner his right to confront his accuser in the lower courts. The state trial court and appellate court never addressed this federal issue. Therefore, this Court should not review this issue. Further, Ohio's evidentiary rule that allows a child's hearsay statement to be admitted in child sex abuse cases does not violate Petitioner's sixth amendment right to confront his accusers. Therefore, Petitioner's Application for a Writ should be denied.

Respectfully submitted,

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